IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

J U D G M E N T

Smt. Kalawati v. Smt. Bimla & Anr.

D.B.CIVIL SPECIAL APPEAL(W) NO.799/2006

Date of Judgment :: 20th February, 2007

P R E S E N T

HON'BLE THE CHIEF JUSTICE SHRI S.N.JHA
HON'BLE JUSTICE SHRI GOVIND MATHUR

Mr. T.C.Sharma, for the appellant.
Mr. K.S.Gill, for the respondent.

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BY THE COURT : (Per Hon'ble Mathur,J.)

This special appeal is directed to challenge the judgment and order of learned Single Judge dated 3.7.2006, accepting the writ petition of the respondent No.1 by setting aside the order dated 3.12.2005 passed by learned Civil Judge (SD), Bhadra, in an Election Petition preferred by present appellant under Section 43 of the Rajasthan Panchayati Raj Act, 1994 (hereinafter referred to as “the Act of 1994”).

The facts leading upto the present appeal may be briefly stated as follows:

By way of an Election Petition under Section 43 of the Act of 1994, the election of respondent No.1

Smt. Bimla, as Sarpanch of Gram Panchayat Bharwana, was challenged by appellant Smt. Kalawati wife of Shri Ramswaroop on the ground of improper reception and counting of votes. The appellant in the election petition alleged that at the time of scrutiny 120 ballot papers were found carrying seal at the line in between the names of Smt. Bimla and Smt. Kalawati wife of Jhanduram, but those ballots were counted in favour of Smt. Bimla despite objection. The appellant election petitioner also alleged that 30 ballot papers were carrying thumb impression instead of prescribed seal but those too were counted as vote in favour of Smt. Bimla and that materially effected the election result. It is pertinent to note here that Smt. Bimla was declared elected on securing 591 votes and the election petitioner by securing 545 votes was nearest rival to the returned candidate.

On basis of the pleadings, learned Civil Judge (SD) framed four issues and recorded evidence produced by the parties. During hearing of the election petition learned Civil Judge by and order dated 3.12.2005 after considering the evidence led by the parties, reached at the conclusion that for objective and judicious adjudication of the issue involved, inspection and recounting of ballot papers is necessary, therefore, ordered for that accordingly. Aggrieved by the order aforesaid the returned candidate preferred a writ petition, that came to be

accepted by judgment impugned dated 3.7.2006 on following counts:-

> (1)the secrecy of ballots is sacrosanct and could not be violated without establishing prima facie that inspection and recounting of ballots was necessary for effectual determination of dispute. In the instant matter the case pleaded by the election petitioner in election petition and evidence in support thereof is so vague and inconsistent, that does not establish a prima facie case to order for inspection and recounting of ballot papers;
>
> (2)learned Civil Judge failed to appreciate before making of an order for inspection and recounting of ballot papers that the discrepancy in total number of votes was such that it would have materially effected result of election; and
>
> (3)the election petitioner failed to establish that any request in writing as required under Rule 49(6) of the Rajasthan Panchayati Raj (Election) Rules, 1994 for inspection and recounting of ballot papers was made by her to the returning officer, therefore, the election petitioner is not entitled to seek inspection of ballot papers and their recounting.

While giving challenge to the judgment and order impugned the case of the appellant is that the issue of the inclusion of 120 ballot papers carrying

seal at the dividing line between the names of the respondent No.1 and Smt. Kalawati wife of Jhanduram despite objection, as well as the issue of including 30 invalid votes being having thumb impression instead of seal is specifically pleaded by her in the petition and sufficient evidence is adduced to support the facts and grounds contained therein, as such learned Single Judge erred, while holding the case pleaded by the election petitioner vague and the evidence adduced as inconsistent.

It is further contended that the conclusion of learned Single Judge to the effect that learned Civil Judge failed to appreciate before making an order of inspection and recounting of ballot papers about material effect on result of the election due to discrepancy in total number of votes is erroneous as the respondent No.1 was declared elected by a margin of 46 votes, whereas the ballots in dispute are 150, thus this fact itself is sufficient to establish that the discrepancy alleged in the event of its acceptance would have effected result of the election materially.

By placing reliance upon the judgment of Hon'ble Supreme Court in the case of Sohanlal v. Babu Gandhi & Ors., reported in 2003(1) SCC 108, it is asserted by counsel for the appellant that where a prima facie case is made out, a Civil Judge (SD), while adjudicating an election petition under Section

43 of the Act of 1994, may direct for inspection and recounting of ballots irrespective of making request in writing in this regard, as such learned Single Judge committed an error by holding that without establishing the factum of making a request in writing, no order for inspection and recounting of ballot papers could have been granted.

No doubt it is true that secrecy of ballot papers is sacrosanct and should not be violated merely on asking, but as held by Hon'ble Supreme Court in the case of Jitendra Bahadur Singh v. Krishna Behari and others, AIR 1970 SC 276, permission for inspection of ballot papers can be given, if the election petition contained an adequate statement of material facts on which election petitioner relies in support of his case and the authority adjudicating the election petition is satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of ballot papers is necessary. Thus, the question before us is whether the election petitioner pleaded adequate facts to warrant inspection and recounting of ballot papers?

On a careful consideration of election petition and evidence it is manifest that an unambiguous statement of facts was available on basis of that the Civil Judge (SD) prima facie found that inspection and recounting of ballot papers is

essential in order to decide the dispute and to do complete justice between the parties. The facts pleaded in the petition reads as follows:-

"(3) यह कि उक्त पंचायत भरवाना के सरपंच पद के लिये मतदान 31-1-2005 को हुआ तत्पश्चात् मतगणना की गई। रिटर्निंग अधिकारी द्वारा 31-1-2005 को जो चुनाव परिणाम घोषित किया गया उसके अनुसार सरपंच पद के उम्मीदवारों को प्राप्त वैध मतों की संख्या व नामंजूर किये गये मतों की संख्या निम्न प्रकार है:-

क्र0सं0	नाम उम्मीदवार	प्राप्त वैध मत
1-	कमला	02
2-	कलावती पत्नि रामस्वरूप	545
3-	कलावती धर्मपत्नि इंडुराम	530
4-	बिमला	591
5-	रोशनी	485
6-	सुशीला	64

नामंजूर किये गये मतों संख्या:- 13

कुल डाले गये मत:- 2230 – 2228

रिटर्निंग अधिकारी द्वारा प्रत्यर्थी को 46 मतों से सरपंच पद के लिये विजयी घोषित किया गया। इस चुनाव परिणाम प्ररूप-7 की प्रमाणित प्रतिलिपि संलग्न याचिका है।"

"कि रिटर्निंग अधिकारी द्वारा घोषित चुनाव परिणाम के अनुसार प्रत्यर्थी को सर्वाधिक वैध मत कुल 591 प्राप्त होने तथा उसके बाद प्रार्थीया को 545 वैध मत प्राप्त होने दर्शाये गये है। वस्तुत: प्रत्यर्थी को सर्वाधिक वैध मत प्राप्त नहीं हुवे थे और ना ही उसे प्राप्त वैध मतों की संख्या 591 थी बल्कि सर्वाधिक वैध मत 545 प्रार्थीया को ही प्राप्त हुवे थे लेकिन मतगणना दल व रिटर्निंग अधिकारी द्वारा मत पत्रों की सही एवं निष्पक्ष रूप से जांच, छंटनी व गणना नहीं की गई। गणना दल द्वारा मतपत्रों की छंटाई के समय 120 मत पत्र ऐसे पाये गये जिन पर लगी मोहर निशानी प्रत्यर्थी बिमला के खाने में नहीं थी बल्कि प्रत्यर्थी बिमला एवम् अन्य उम्मीदवार कलावती धर्मपत्नि झंडूराम के खानों के मध्य स्थित विभाजन रेखा पर थी जिनसे इन मतदाताओं का आशय कतई प्रकट नहीं होता था कि वे किस उम्मीदवार के पक्ष में मतदान करना चाहते थे। ये 120 मत अवैध मत होने के कारण अस्वीकार किये जाने योग्य थे व है। इन 120 मतपत्रों बाबत प्रार्थीया द्वारा आपत्ति की गई और उन्हें अस्वीकार किये जाने की प्रार्थना की गई। मतगणना दल द्वारा इन 120 मतपत्रों को संदिग्ध होना मानकर उन्हें पहले अलग रखा और कहा कि इन मत पत्रों बाबत निर्णय रिटर्निंग अधिकारी द्वारा किया

जायेगा लेकिन बाद में प्रत्यर्थी के निवेदन पर एवम् प्रत्यर्थी के विरोध के बावजूद भी मतगणना दल व रिटर्निंग अधिकारी ने इन 120 अवैध मत पत्रों को प्रत्यर्थी के वैध मतों में शामिल करके प्रत्यर्थी के मतों की गणना की और इन 120 अवैध मतों को प्रत्यर्थी को मिले मत होना मानकर उसे 46 मतों से विपक्षी घोषित किया गया जबकि वस्तुत: ये 120 मत पूर्णतया अवैध थे।"

"कि मतगणना दल द्वारा मतपत्रों की छंटाई के दौरान 30 मतयपत्र ऐसे भी पाये गये जिन पर प्रत्यर्थी के खाने में मोहर का निशान लगा हुवा नहीं था बल्कि अंगूठा निशान अंकित था । इन 30 मत पत्रों बाबत भी अभ्यर्थी द्वारा आपत्ति की गई। पहले तो इन्हें मतगणना दल द्वारा सन्देहपूर्ण होना मासनकर पूर्व में वर्णित 120 मत पत्रों के साथ अलग रखा गया लेकिन बाद में प्रत्यर्थी के निवेदन पर एवम् अभ्यर्थी के विरोध के बावजूद इन 30 मत पत्रों को भी मतगणना दल द्वारा व रिटर्निंग अधिकारी द्वारा प्रत्यर्थी को प्राप्त वैध मत मानकर उनकी गणना प्रत्यर्थी के पक्ष में की गई। इस प्रकार मतगणना दल द्वारा व रिटर्निंग अधिकारी द्वारा इन 30 अवैध मत पत्रों को नाजायज रूप से प्रत्यर्थी के पक्ष में गिना गया है।"

The appellant in her statements recorded before the Civil Judge (SD) also reiterated the factual averments as follows:-

"कलावती व विमला के खाने को टच करने वाले कुल 120 वोट थे व अंगूठे लगे 30 वोट थे। ये वोट अलग ढेरी में थे। ये वोट मैंने स्वय ने देखे थे। मैंने गिनती के समय इन 150 वोटों के बाबत दरख्वास्त दी थी । दरख्वास्त मेरे एजेन्ट भागाराम ने लिखी थी। दरख्वास्त गिनती करने वाले को दी थी।"

" 120 मत पत्रों की गिनती के समय खारिज माने थे और 30 अंगूठे वाले वोट भी खारिज माने गये थे।"

The returned candidate respondent Smt. Bimla in her statement stated as under:-

> “120 वोट पर बीच की लाईन पर मोहर लगी होना बिल्कुल गलत है। गिनती के समय अंगुठा निशानी लगे हुऐ कोई वोट नहीं थे तथा अगूंठे लगे हुऐ 30 वोट उस समय नहीं मिले थे 120 व 30 वोटों को गिनती के समय अलग नहीं रखे थे। तथा ऐसे किसी वोट को मेरे जाने में नहीं मिलाया गया।"

The election petition certainly contains concise statement of material facts and that is substantiated by election petitioner in her statements. The question as to what would constitute material facts, depends upon the facts and circumstances of each case. In the instant matter the Civil Judge (SD), on basis of statement of facts by recording adequate reasons found it prima facie necessary to inspect and recount ballot papers and rightly ordered to do so as in the existing circumstances that was the only mode to resolve the issue in dispute.

So far as the second argument of counsel for the appellant is concerned, it is worth to be noted that the election petitioner lost the election by 46 votes and dispute is with regard to counting of 150 alleged invalid ballot papers, therefore, certainly the alleged errors are of such magnitude that would materially effect the result of election.

We also found force in the contention of counsel for the appellant that where a case is made

out, a Civil Judge (SD) while adjudicating an election petition under Section 43 of the Act of 1994 may direct for inspection and recounting of ballot papers irrespective of making request in writing in this regard. Rule 49(6) of the Rules of 1994 prescribes that any candidate, present at the counting, may at any time, during counting of votes, request the returning officer in writing to recount the ballot papers relating to the ward and the returning officer may, for the reasons to be recorded, either reject the request or order recounting of votes.

Hon'ble Supreme Court in the case of Sohanlal (supra) while dealing with an analogous provision under M.P. Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993, held as under:-

> “It is not correct to hold that, in an election petition, after the declaration of the result, the court or tribunal cannot direct re-counting of votes unless the party has first applied in writing for re-counting of votes. There is no prohibition in the Act or under the Rules prohibiting the court or tribunal to direct a re-counting of the votes. Even otherwise, a party may not know that the re-counting is necessary till after the result is declared. At this stage, it would not be possible for him to apply for re-counting to the Returning Officer. His only remedy would be to file an election petition under Section 122. In such a case, the court or the tribunal is bound to

> consider the plea and where a case is made out, it may direct re-count depending upon the evidence led by the parties."

Under Rule 49(6) of the Rules of 1994, the returning officer by recording reasons, may order for recounting of ballot papers, if a request in this regard is made in writing by a candidate, but it does not mean that if no such request is made then that candidate even in election petition cannot make a demand for recounting. The provisions of Rule 49 of the Rules of 1994 relate to counting of votes and there is no prohibition for recounting of votes either under the Act of 1994 or under the Rules of 1994. The law laid down by Hon'ble Supreme Court in the case of Sohanlal (supra), therefore, clinches the issue and covers the controversy involved in the present case also.

On a careful reading of the judgment of learned Single Judge, in light of the discussion made above, we are satisfied that no convincing reasons are given therein, for setting aside the order dated 3.12.2005, passed by learned Civil Judge (SD).

In result, this special appeal deserves acceptance, therefore, the same is allowed. The judgment dated 3.7.2006 passed by learned Single Judge in SBCivil Writ Petition No.7236/05 is quashed, consequent thereto the order passed by learned Civil

Judge (SD), Bhadra dated 3.12.2005 in Election Petition No.4/2005, Kalawati wife of Ramswaroop Jat v. Bimla wife of Omprakash, stands restored.

No order to costs.

(GOVIND MATHUR),J. (S.N.JHA),CJ.

Kkm/ps.